

IN THE

**Supreme Court of the United States**

JUN 4 1989

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CLERK

OCTOBER TERM, 1989

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PETER A. BRADFORD, HAROLD A. JERRY, JR., GAIL GARFIELD SCHWARTZ, ELI M. NOAM, JAMES T. McFARLAND, EDWARD M. KRESKY and HENRY G. WILLIAMS, in their official capacity as Commissioners of the Public Service Commission of the State of New York,

*Petitioners,*

vs.

NATIONAL FUEL GAS SUPPLY CORPORATION,

*Respondent.*

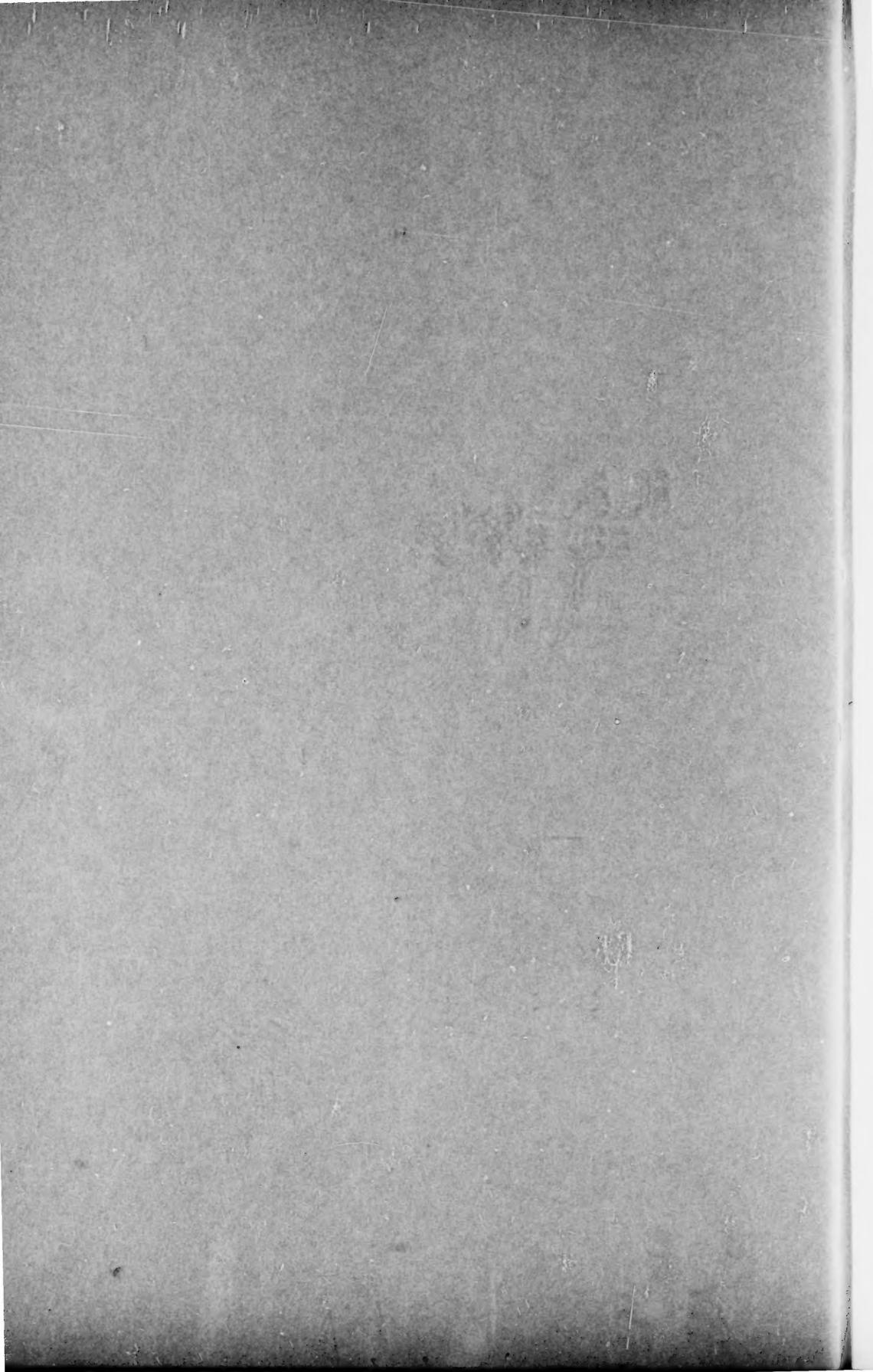
ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

**RESPONDENT'S BRIEF IN OPPOSITION**

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## **QUESTION PRESENTED**

Does the Federal Energy Regulatory Commission's exclusive jurisdiction to regulate facilities used to transport natural gas in interstate commerce preempt New York Public Service Commission efforts to regulate the same facilities?

**STATEMENT PURSUANT TO RULE 29.1**

Respondent National Fuel Gas Supply Corporation is a wholly owned subsidiary of National Fuel Gas Company. National Fuel Gas Company also wholly owns National Fuel Gas Distribution Corporation, Penn-York Energy Corporation, Seneca Resources Corporation, Empire Exploration, Inc., Utility Constructors, Inc., Highland Land & Minerals, Inc., Enerop Corporation, and Data-Track Account Services, Inc.

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OCTOBER TERM, 1989  
No. 89-1749

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PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PETER A. BRADFORD, HAROLD A. JERRY, JR., GAIL GARFIELD SCHWARTZ, ELI M. NOAM, JAMES T. MCFARLAND, EDWARD M. KRESKY and HENRY G. WILLIAMS, in their official capacity as Commissioners of the Public Service Commission of the State of New York,

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**RESPONDENT'S BRIEF IN OPPOSITION**

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**STATEMENT OF THE CASE**

National Fuel Gas Supply Corporation ("National Fuel") instituted this action for a declaratory judgment because the Public Service Commission of the State of New York (the "PSC") seeks to regulate National Fuel's natural gas pipeline facilities that are used and to be used exclusively for the interstate transportation and sale for resale of natural gas in interstate

commerce. Since such facilities are regulated exclusively by federal law pursuant to the Natural Gas Act, 15 U.S.C. § 717 *et seq.* (1976 & Supp. 1990), and the Natural Gas Pipeline Safety Act, 49 U.S.C. § 1671 *et seq.* (1983 & Supp. 1990), National Fuel contends that the PSC's attempt to regulate those facilities violates the Supremacy Clause of the United States Constitution, article VI, clause 2, and is preempted.

#### A. Federal Regulation of Pipeline Facilities Used To Transport Natural Gas In Interstate Commerce.

In the Natural Gas Act, Congress declared that “the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.” 15 U.S.C. § 717(a).<sup>1</sup> Congress drew a precise line between those matters regulated by the Natural Gas Act and those to which the Natural Gas Act does not apply, stating that the Natural Gas Act:

*shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.*

15 U.S.C. § 717(b) (emphasis added). Congress conferred comprehensive authority to implement and administer the Natural Gas Act on the Federal Energy Regulatory Commission

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<sup>1</sup> The relevant portions of the Natural Gas Act, 15 U.S.C. §§ 717, 717a, 717f, and 717o, are reproduced as Appendix F to the Petition For A Writ Of Certiorari (“Petition”), pp. 64a - 71a.

("FERC") (formerly the Federal Power Commission). 15 U.S.C. § 717o. The Natural Gas Act and the Natural Gas Pipeline Safety Act, 49 U.S.C. §§ 1671-1684, form a comprehensive national regulatory policy for natural gas transported or sold in interstate commerce.

Pursuant to section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), a "natural-gas company" must obtain a "certificate of public convenience and necessity" from FERC before constructing, expanding, acquiring or operating any facilities involved in the transportation or sale of natural gas in interstate commerce. Pursuant to section 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b), no "natural-gas company" may abandon any portion of its facilities involved in the transportation or sale of natural gas in interstate commerce without first obtaining the permission and approval of FERC.

Under its regulatory authority, FERC has promulgated extensive regulations entitled "Applications for Certificates of Public Convenience and Necessity and for Orders Permitting and Approving Abandonment Under Section 7 of the Natural Gas Act, as Amended, Concerning Any Operation, Sales, Service, Construction, Extension, Acquisition or Abandonment." 18 C.F.R. Part 157, Subpart A (1989).<sup>2</sup> Those regulations require that applicants for a certificate of public convenience and necessity submit "all pertinent data and information necessary for a full and complete understanding of the proposed project...." 18 C.F.R. § 157.5(a).

Applicants for a certificate of public convenience and necessity are required to attach numerous exhibits setting forth extensive information to their applications. 18 C.F.R. § 157.14. Applications to abandon facilities require additional submissions. 18 C.F.R. § 157.18. Each exhibit must "provide a full and complete explanation of the data submitted, the manner in which it was obtained, and the reasons for the conclusions which are derived"

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<sup>2</sup> 18 C.F.R. Part 157, Subpart A, §§ 157.5-157.21, is reproduced in Appendix G to the Petition, pp. 79a - 120a.

therefrom. 18 C.F.R. §§ 157.14(a) and 157.18. The required exhibits include, *inter alia*, a geographical map showing the subject facilities and their size; flow diagrams showing operations with and without the subject facilities; a detailed estimate of the total capital cost of the subject facilities and plans for financing those costs; and a statement setting forth the arrangements in place for constructing, operating, and managing the facilities. 18 C.F.R. § 157.14(a).

The exhibits must also include a statement of the factors considered in locating the facilities, including the possibility of using existing rights-of-way (18 C.F.R. § 157.14(a)(6-a)); a statement of the factors considered in locating facilities in scenic, historic, recreational or wildlife areas and the reasons for such location (18 C.F.R. § 157.14(a)(6-b)); a statement that the applicant has adopted the guidelines for planning, locating, constructing and maintaining facilities contained in 18 C.F.R. § 2.69, which provides that “[i]n the interest of preserving scenic, historic, wildlife and recreational values, construction and maintenance of facilities authorized by certificates granted under section 7(c) of the Natural Gas Act should be undertaken in a manner that will minimize adverse effects on these values” (18 C.F.R. § 157.14(a)(6-c)); and a statement concerning the environmental impact of the proposed project in compliance with the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (1983 & Supp. 1989) (18 C.F.R. §§ 157.1-4(a)(6-d) and 380.3). Where other federal, regional, state or local permits, licenses or certificates are to be obtained before the proposed action can be completed, they are to be identified. 18 C.F.R. § 380, App. A ¶ 9.1 (“such as permits needed . . . for construction and waste discharges”).

Notice of each application to FERC for a certificate of public convenience and necessity under section 7 of the Natural Gas Act must be published in the Federal Register and mailed to the states affected by the proposed project. 18 C.F.R. § 157.9. That notice fixes the time within which persons desiring to participate in the proceeding, including any interested state commission, must file a petition or notice of intervention. 18 C.F.R.

§ 157.10. Upon the filing of a timely notice of intervention, a state commission becomes a party to the proceeding as of right. 18 C.F.R. § 385.214.

Before issuing a certificate to a qualified applicant, FERC must find that "the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity. . ." 15 U.S.C. § 717f(e).

**B. Article VII of the Public Service Law of the State of New York.**

Article VII of the Public Service Law of the State of New York, §§ 120-130 (McKinney 1989),<sup>3</sup> titled "Siting of Major Utility Transmission Facilities," requires persons who seek to construct major utility transmission facilities in New York State, including natural gas transmission lines extending a distance of one thousand feet or more to be used to transport natural gas at pressures of one hundred twenty-five pounds per square inch or more, to obtain first a certificate of environmental compatibility and public need from the Public Service Commission of the State of New York. N.Y. Pub. Serv. Law § 121.

Before issuing a certificate of environmental compatibility and public need for a natural gas transmission line, the PSC must find and determine:

- (a) the basis of the need for the facility;
- (b) the nature of the probable environmental impact;

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<sup>3</sup> Article VII of the Public Service Law of the State of New York is reproduced as Appendix E to the Petition, pp. 48a - 63a.

(c) that the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations including but not limited to, the effect on agricultural lands, wetlands, parklands, and river corridors traversed; . . .

(e) . . . that the location of the line will not pose an undue hazard to persons or property along the area traversed by the line;

(f) that the location of the facility as proposed conforms to applicable state and local laws and regulations issued thereunder. . . ; [and]

(g) that the facility will serve the public interest, convenience and necessity. . . .

N.Y. Pub. Serv. Law § 126 subd. 1. For natural gas transmission lines extending a distance of less than ten miles, the PSC need make only the determinations required by paragraphs (a), (b), (e), (f) and (g) of Public Service Law § 126 subd. 1. N.Y. Pub. Serv. Law § 121-a subd. 7.

By its terms, Article VII is not applicable to major utility transmission facilities “[o]ver which any agency or department of the federal government has exclusive jurisdiction. . . .” N.Y. Pub. Serv. Law § 121 subd. 4.c. Although Article VII was added to the Public Service Law in 1970, it is only in the last few years that the PSC has sought to subject pipelines used to transport natural gas in interstate commerce to its requirements.

#### **C. National Fuel's West Seneca Pipeline Project and the FERC Proceedings Thereon.**

As a company engaged in the transportation of natural gas in interstate commerce and the sale in interstate commerce of natural gas for resale for ultimate public consumption, National Fuel is a “natural-gas company” subject to regulation by FERC under the Natural Gas Act. 15 U.S.C. § 717a(6).

On January 27, 1986, National Fuel filed an application with FERC, Docket No. CP86-292-000, pursuant to sections 7(b) and 7(c) of the Natural Gas Act, for permission and approval to abandon 1.78 miles of 20-inch bare steel pipeline and a regulator station and for a certificate of public convenience and necessity authorizing the construction and operation of 1.61 miles of 20-inch coated steel pipeline and a regulator station to replace those abandoned, all located in the town of West Seneca, Erie County, New York. Natural gas is transported, directly and indirectly, through National Fuel's pipeline to distribution companies for resale in the States of Ohio, Pennsylvania, New York, New Jersey and Massachusetts. The facilities to be abandoned are used solely for transporting natural gas in interstate commerce; the replacement facilities will be used solely for transporting natural gas in interstate commerce.

As required by FERC regulations, National Fuel's application for a certificate of public convenience and necessity included a topographic map showing the precise location of the proposed pipeline, a statement of the factors considered in locating the facility in scenic, historical, recreational, or wildlife areas and an environmental report that discussed the water use and quality in each stream to be crossed, vegetation and wildlife, cultural resources, geological hazards and resources, soil resources, the uses of the land to be traversed, and alternatives to the proposed route. The environmental report also provided a sketch of the construction methods to be used to cross surface waters, a description of the source and discharge of waters to be used for hydrostatic testing of the new pipeline, and an erosion control and revegetation plan. In the environmental report, National Fuel stated its intention to procure stream and road crossing permits from the New York State Department of Environmental Conservation, the Erie County Department of Public Works and the New York State Department of Transportation.

On February 20, 1986, FERC issued notice of National Fuel's application. Notice was published in the Federal Register on February 26, 1986 (51 Fed. Reg. 6796). The PSC elected not to

file a notice of intervention to become a party to National Fuel's application proceeding.

FERC issued an Order Authorizing Abandonment and Issuing Certificate on June 16, 1986.<sup>4</sup> In that Order, FERC found that the facilities involved are used or will be used in the transportation of natural gas in interstate commerce subject to its jurisdiction. Petition Appendix C, p. 38a. FERC issued a certificate of public convenience and necessity "authorizing National Fuel to construct and operate the subject facilities and to deliver gas at the new delivery point." *Id.*, p. 39a.

On October 19, 1987, National Fuel filed a petition with FERC, Docket No. CP86-292-001, to amend FERC's June 16, 1986 Order. National Fuel sought a certificate of public convenience and necessity to install 1.45 miles of 20-inch coated steel pipe on a revised route. National Fuel revised the environmental report, cost of facilities statement, and topographic map submitted with its 1986 application.<sup>5</sup>

FERC issued notice of National Fuel's petition to amend on October 28, 1987. Notice was published in the Federal Register on November 4, 1987 (52 Red. Reg. 42337). Once again, the PSC elected not to become a party to National Fuel's proceeding.

FERC issued an Order Amending Certificate on July 5, 1988 that approved the revised route.<sup>6</sup> In that Order, FERC amended the previous certificate of public convenience and necessity "so as to authorize the construction and operation of replacement pipeline along a modified route." Petition Appendix C, p. 41a.

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<sup>4</sup> FERC's June 16, 1986 Order is reproduced in Appendix C to the Petition, pp. 37a - 39a.

<sup>5</sup> National Fuel's supplemental environmental report illustrates the specificity of FERC review of pipeline siting. Attached to that report was a survey drawing showing that, with the property owner's consent, the revised pipeline route would pass 22.5 feet from the corner of a residence and 15 feet from the property line.

<sup>6</sup> FERC's July 5, 1988 Order is reproduced in Appendix C to the Petition, pp. 40a - 42a.

National Fuel had previously obtained road crossing permits from the Erie County Department of Public Works, Division of Highways, and the New York State Department of Transportation and a stream crossing permit from the New York State Department of Environmental Conservation for the new pipeline route, but those permits had lapsed. Thus, FERC noted that "National Fuel will also have to file for a renewal of its stream crossing and road crossing permits with the appropriate authorities." *Id.*

#### D. The Proceedings and Decision Below.

The present PSC contends that it has Article VII jurisdiction over *all* natural gas pipelines in New York State longer than one thousand feet used to transmit gas at pressures of one hundred twenty-five pounds per square inch or more, including pipelines used to transport natural gas in interstate commerce. Thus, despite National Fuel's certificate of public convenience and necessity from FERC authorizing the West Seneca pipeline replacement project and National Fuel's compliance with the terms of that certificate, the PSC threatens to fine National Fuel up to \$100,000 per day if National Fuel does not comply with Article VII before beginning that project.<sup>7</sup>

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<sup>7</sup> The PSC asserts that National Fuel began this action "[r]ather than obtain stream and road crossing permits from the PSC." Petition, p. 7. This assertion is erroneous to the extent that it implies that National Fuel did not obtain the stream and road crossing permits contemplated by the FERC certificates and thus failed to comply with those certificates. National Fuel fully complied with the FERC certificates by obtaining the contemplated permits from the apposite New York agencies. It was the PSC's insistence that National Fuel submit to its Article VII jurisdiction, although National Fuel had obtained permits from these other state and local agencies, that forced National Fuel to bring this action.

At certain points, the PSC suggests that National Fuel has not complied with the provisions in the FERC certificate with regard to state and local permits. As Judge Winter explained, however, "[t]o the extent that the PSC desires to challenge National Fuel's compliance with the FERC order, it may pursue whatever federal administrative and judicial remedies are available to compel that compliance." Petition Appendix A, p. 18a; *National Fuel Gas Supply Corp. v. PSC*, 894 F.2d 571, 579 (2d Cir. 1990). In any such proceeding, National Fuel would expect to show that it had complied fully with FERC's requirements.

On November 9, 1988, National Fuel instituted this action in the United States District Court for the Northern District of New York for judgment declaring that Article VII is preempted by federal law and federal regulation with respect to natural gas pipeline facilities used exclusively to transport natural gas in interstate commerce and enjoining the PSC from requiring National Fuel to comply with Article VII before constructing such facilities.

After the PSC answered National Fuel's complaint, National Fuel and the PSC filed cross-motions for summary judgment. In a decision delivered after argument on April 7, 1989, Judge Howard G. Munson denied National Fuel's motion, granted the PSC's motion and dismissed National Fuel's complaint.<sup>8</sup>

National Fuel filed a timely Notice of Appeal with the United States Court of Appeals for the Second Circuit on May 4, 1989. On January 24, 1990, the Second Circuit reversed the District Court decision in an opinion written by Judge Winter.<sup>9</sup> Relying on this Court's decision in *Schneidewind v. ANR Pipeline Company*, 485 U.S. 293 (1988), the Second Circuit held that, in the Natural Gas Act, Congress vested FERC with exclusive authority over the rates *and facilities* of interstate gas pipelines. Petition Appendix A, pp. 11a - 12a; *National Fuel Gas Supply Corp. v. PSC*, 894 F.2d at 576. In response to the PSC's assertion that it intended to limit its Article VII jurisdiction to site-specific environmental review, the Second Circuit stated that PSC "review is undeniably a regulation of a facility used in the interstate transportation of natural gas. Such proceedings would certainly delay and might well, by the imposition of additional requirements or prohibitions, prevent the construction of federally approved interstate gas facilities." Petition Appendix A,

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\* The transcript of Judge Munson's April 7, 1989 decision is reproduced in Appendix B to the Petition, pp. 27a - 36a.

\* The Second Circuit opinion is reproduced in Appendix A to the Petition, pp. 1a - 18a, and is reported at *National Fuel Gas Supply Corp. v. PSC*, 894 F.2d 571 (1990).

p. 12a; *National Fuel Gas Supply Corp. v. PSC*, 894 F.2d at 576-77 (footnote omitted). The Second Circuit further held that a comparison of Article VII and the FERC regime reveals such substantial overlap that preemption would have to be inferred from Congress's complete occupation of the field that the PSC would regulate. Petition Appendix A, pp. 12a - 13a; *National Fuel Gas Supply Corp. v. PSC*, 894 F.2d at 577.

On March 14, 1990, the Second Circuit denied a PSC motion for rehearing. On April 27, 1990, the Second Circuit denied a PSC motion for clarification, but granted the PSC a stay of the Second Circuit mandate on the condition that the PSC file its petition for certiorari within fourteen days.

## SUMMARY OF ARGUMENT

There are no special and important reasons for this Court to review this case on writ of certiorari. The decision of the United States Court of Appeals for the Second Circuit is wholly consistent with this Court's numerous decisions holding that, under the Natural Gas Act, FERC has exclusive and comprehensive jurisdiction over interstate natural gas transmission facilities. All regulation of such facilities by the states is preempted; environmental review is no exception.

The Second Circuit correctly held that Article VII may not be employed to regulate interstate natural gas transmission facilities. Congress has so completely occupied the field of regulation of interstate natural gas transmission facilities that the PSC cannot apply Article VII to such facilities without the imminent possibility of conflict with the FERC regime, thus offending the Supremacy Clause.

## REASONS FOR DENYING THE WRIT

### I. THE SECOND CIRCUIT'S HOLDING THAT FERC REGULATION OF NATURAL GAS PIPELINES USED IN INTERSTATE COMMERCE IS COMPREHENSIVE AND PREEMPTS ANY STATE REGULATION OF THE SAME FACILITIES FOLLOWS THE DECISIONS OF THIS COURT.

The Second Circuit simply followed this Court's decision in *Schneidewind v. ANR Pipeline Company*, 485 U.S. 293 (1988), which held that under the Natural Gas Act, FERC has exclusive authority over the "rates and facilities" of interstate gas pipelines. See 485 U.S. at 300-01, 306 (emphasis added). Moreover, *Schneidewind* does not stand alone. Numerous decisions of this Court interpreting section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b), establish two principles. First, in section 1(b), "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary . . . case-by-case analysis." *FPC v. Southern Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964). Second, for matters on the federal side of the bright line drawn by section 1(b), FERC jurisdiction is exclusive and comprehensive.<sup>10</sup>

The NGA long has been recognized as a "comprehensive scheme of federal regulation of 'all wholesales of natural gas in interstate commerce.'" *Northern Natural Gas Co. v. State Corporation Comm'n of Kansas*, 372 U.S. 84, 91 (1963), quoting *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 682

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<sup>10</sup> The PSC's reliance on *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, 489 U.S. 493, 109 S. Ct. 1262 (1989) in support of its contention that Congress did not intend to occupy the entire natural gas field (Petition, p. 12) is misplaced and ignores the bright line drawn by the Natural Gas Act. The Kansas Commission's order in that case regulated "production rates in order to protect producers' correlative rights — a matter firmly on the States' side of that dividing line [in Section 1(b) of the Natural Gas Act]." 109 S. Ct. at 1276. Since the Kansas order "regulates in a field that Congress expressly left to the States; it does not conflict with the federal regulatory scheme; hence it is not pre-empted." 109 S. Ct. at 1273.

(1954). The NGA confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale. *Northern Natural Gas Co.*, 372 U.S., at 89. FERC exercises authority over the rates and facilities of natural gas companies used in this transportation and sale through a variety of powers.

*Schneidewind*, 485 U.S. at 300-01 (footnote omitted).

In light of this long history of consistent holdings, the PSC's characterization of the Second Circuit's decision as premised on an erroneous reading of dicta in *Schneidewind* is itself mistaken. At the time *Schneidewind* was decided, FERC's exclusive jurisdiction over interstate natural gas pipeline facilities was well established. The question in *Schneidewind* was whether that exclusive jurisdiction could be extended to include regulation of the issuance of securities by natural-gas companies, a matter over which FERC has no express jurisdiction. Exclusive FERC jurisdiction over transportation facilities, which are expressly entrusted to FERC in the Natural Gas Act, was a given. In holding that states could not regulate securities offerings that were not regulated by FERC, this Court explained:

The authorities on which respondents rely state only what is now well settled: Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce. *See, e.g., Illinois Gas Co. v. Central Illinois Public Service Co.*, 314 U.S. 498, 506-507 (1942).

*Schneidewind*, 485 U.S. at 305.<sup>11</sup>

<sup>11</sup> FERC has repeatedly stated its view that the jurisdiction it enjoys over interstate natural gas transmission facilities pursuant to the Natural Gas Act is exclusive and comprehensive. *See, e.g., Texas Gas Transmission Corp.*, FERC Docket No. CP88-413-000, slip. op. at 9 (November 1, 1989) ("[T]he Arkansas Commission does not have jurisdiction over this matter. The transportation services which Texas proposes to provide for Quincy are in interstate commerce and, as such, are exclusively within the jurisdiction of this Commission."); *Williams Natural Gas Co.*, 47 F.E.R.C. (CCH) ¶ 61,308 n.5 (May 31, 1989) (Footnote continued)

*Schneidewind* and its predecessors cannot be distinguished as being concerned solely with the effect of state regulation on rates for wholesale gas sales, as the PSC contends. *Schneidewind* expressly considered "rates and facilities." 485 U.S. at 300-01, 306. As this Court recognized in *FPC v. East Ohio Gas Co.*, 338 U.S. 464, 468 (1950), the Natural Gas Act specifies that FERC jurisdiction includes the *transportation*, as well as the *sale*, of natural gas in interstate commerce.

§ 1(b) made the Natural Gas Act applicable to three separate things: "(1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale." And throughout the Act "transportation" and "sale" are viewed as separate subjects of regulation. They have independent and equally important places in the Act.

338 U.S. at 468 (*quoting Panhandle Eastern Pipeline Co. v. PSC*, 332 U.S. 507, 516 (1947)).

*Schneidewind* also cannot be distinguished on the ground that the regulations at issue there could "impede[] — and could easily prevent — construction" of interstate facilities. Petition, p. 16. In *Schneidewind*, Michigan's efforts to regulate securities offerings could, at worst, only have an indirect effect on construction of interstate facilities. Here, as the Second Circuit recognized, PSC proceedings under Article VII "would certainly delay and might well, by the imposition of additional requirements or prohibitions, prevent the construction of federally approved interstate gas facilities," even if those proceedings were limited to the environmental review claimed by the PSC.<sup>12</sup>

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1989)(“Under section 1(b) of the NGA, the Commission has plenary regulatory authority over all interstate transportation of natural gas”); *Cumberland and Allegheny Gas Co.*, Opinion No. 573, 43 F.P.C. 275, 285 (1970); *In Re Tamborello*, 14 F.P.C. 123, 125 (1955); and *Pennian Basin Pipeline Co.*, 12 F.P.C. 1406, 1407 (1953).

<sup>12</sup> As the Second Circuit noted,

The PSC concedes that just such delays were visited upon *amicus curiae* Columbia Gas Transmission Corporation in an Article VII

(Footnote continued)

Petition Appendix A, p. 12a; *National Fuel Gas Supply Corp. v. PSC*, 894 F.2d at 576-77.

## II. THE SECOND CIRCUIT CORRECTLY CONCLUDED THAT ENVIRONMENTAL REVIEW OF INTERSTATE FACILITIES BY THE PSC IS INCOMPATIBLE WITH FERC'S EXCLUSIVE JURISDICTION.

The PSC contends that there is a distinction between siting of a transmission line on a piece of land and analysis of the steps necessary to protect that land from the impact of the siting. It is a distinction without a difference because FERC has the authority to, and does, consider both issues.

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proceeding concerning an interstate gas facility. It argues, however, that those delays were caused by extraordinary and exceptional local opposition. We perceive no reason to expect that local opposition will be an exceptional event, particularly because there may generally be little local benefit from interstate facilities.

Petition Appendix A, p. 12a n.2; *National Fuel Gas Supply Corp. v. PSC*, 894 F.2d at 576 n.2.

The PSC contends that Article VII was intended to expedite, rather than delay, pipeline construction. Nothing in the Second Circuit's opinion precludes a person from complying with a FERC requirement that state or local permits be secured by invoking Article VII. Here, however, National Fuel obtained all FERC-required permits from appropriate agencies and the PSC nevertheless threatened it with \$100,000 a day fines. If FERC directs that permits be obtained from state and local authorities, and those authorities unreasonably delay issuance of their permits, a certificate holder can simply return to FERC and seek to have the requirement that it obtain those permits modified, or even rescinded. (Of course, the State would have a right to intervene in any such proceeding.) *See infra*. n.13, para. 2.

Despite the PSC's attempt to paint Article VII in a different light, Justice Brandeis recognized in *Buck v. Kuykendall*, 267 U.S. 307, 315 (1925) that the primary purpose of a certification provision (like Article VII) is not regulation but prohibition.

National Fuel provided FERC with all of the environmental data required by FERC regulations, including an environmental impact statement pursuant to the National Environmental Policy Act. As the Second Circuit noted, “[t]he FERC expressly considered various data regarding the environmental effects of National Fuel’s project before issuing a certificate of public convenience and necessity . . . [and while] [t]he PSC was free to intervene and present whatever contrary data it wished [, i]t declined to do so.” Appendix A, pp. 16a-17a; *National Fuel Gas Supply Corp. v. PSC*, 894 F.2d at 578-79.

FERC is charged by the Natural Gas Act with exclusive and comprehensive authority over interstate natural gas pipeline facilities. FERC decisions concerning when, where and how to build such facilities must strike a reasoned balance among many different, often competing, considerations, including environmental ones. The PSC cannot “mollify” the site-specific environmental effects of interstate gas pipelines without intruding upon and upsetting the reasoned balance struck by FERC in granting a certificate of public convenience and necessity.<sup>12</sup> The Second Circuit reasoned that:

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<sup>12</sup> The PSC’s contentions that “[t]he established rule has been that state environmental regulation is permissible” and that “its propriety has been recognized by FERC rules” (Petition, p. 9 n.6) are wrong. The Eighth Circuit in *ANR Pipeline Co. v. Iowa State Commerce Commission*, 828 F.2d 465 (2d Cir. 1987) held that Iowa’s permit requirement for interstate natural gas pipelines was preempted by federal law. The Court then speculated, without analysis, that environmental regulation of interstate pipelines might not be preempted. 828 F.2d at 473. That speculation was pure dicta, and did not “establish” a rule or purport to be summarizing any previously established rule. Most importantly, the Eighth Circuit’s speculation is totally at odds with this Court’s subsequent decision in *Schneidewind v. ANR Pipeline Company*, 485 U.S. 293 (1988), which resoundingly affirmed the exclusivity of FERC jurisdiction.

The requirement in 18 C.F.R. Part 380, App. A ¶ 9 (Petition Appendix G, p. 155a) that an applicant inform FERC of state and local permit requirements and health and safety regulations as part of its environmental report serves to ensure that FERC is made aware of state and local interests. FERC can require that such permit requirements be complied with, as occurred here, or FERC may, in the exercise of its exclusive jurisdiction, hold that compliance is unnecessary. See, e.g., *Algonquin Gas Transmission Co.*, 43 F.E.R.C. (CCH) ¶ 61,554, p. 62,373 (June 29, 1988) and *The Sylvania Corp.*, 47 F.P.C. 330, 332 (1972).

Congress placed authority regarding the location of interstate pipelines — in the present case affecting citizens of four states in addition to New York — in the FERC, a federal body that can make choices in the interests of energy consumers nationally, with intervention afforded as of right to relevant state commissions. *Because FERC has authority to consider environmental issues, states may not engage in concurrent site-specific environmental review.* Allowing all the sites and all the specifics to be regulated by agencies with only local constituencies would delay or prevent construction that has won approval after federal consideration of environmental factors and interstate need, with the increased costs or lack of gas to be borne by utility consumers in other states.

Petition Appendix A, p. 17a; *National Fuel Gas Supply Corp. v. PSC*, 894 F.2d at 579 (emphasis added).

The issue in this case is not similar to the issue confronted by this Court in *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987). The federal choice of land use in that case was not intended to preempt all state regulation of that use, 480 U.S. at 584, nor was there necessarily any inherent incompatibility between the federal land use choice and state regulation, at least so long as the state did not frustrate the federal choice by effectively prohibiting the federally chosen use. 480 U.S. at 586-89. In the Natural Gas Act, Congressional intent to preempt all state regulation of interstate pipeline facilities is expressly stated, and FERC's complete occupation of that field pursuant to the Natural Gas Act is inherently incompatible with state regulation of the same facilities. This Court, moreover, has explicitly recognized that the limitations on the preemptive power of federal regulations that were applied in *California Coastal Commission* are inapplicable to natural gas regulation because of the broad powers conferred on FERC by the Natural Gas Act. *Schneidewind*, 485 U.S. at 309 n.12.<sup>14</sup>

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<sup>14</sup> Cf., *California v. FERC*, No. 89-333, slip op. (U.S. May 21, 1990) (interpreting in the same manner the Federal Power Act's allocation of state and federal regulatory authority over hydroelectric projects).

### III. THE SECOND CIRCUIT PROPERLY APPLIED THE FEDERAL PREEMPTION DOCTRINE.

Contrary to the PSC's contention (Petition, pp. 18-19), Article VII need not be sustained unless it *cannot* be enforced in a constitutional manner. The proper standard, the one employed by the Second Circuit, is whether "there lurks such imminent possibility of collision . . . that [the state regulation] must be declared a nullity to assure the effectuation of the comprehensive federal regulation ordained by Congress." *Northern Natural Gas Co. v. State Corp. Comm'n of Kansas*, 372 U.S. 84, 92 (1963). See also *Schneidewind*, 485 U.S. at 310 and *Maryland v. Louisiana*, 451 U.S. 725, 751 (1981).<sup>15</sup>

"Imminent possibility of collision" between FERC regulation pursuant to the Natural Gas Act and PSC regulation pursuant to Article VII is certainly present. Both statutes purport to regulate comprehensively the same facilities. Further, as the Second Circuit recognized, the PSC's recent attempt to preserve a portion of its jurisdiction by offering to limit itself to site-specific environmental review is unavailing because the frustration of federal aims by Article VII proceedings would still be likely.<sup>16</sup> The Second Circuit's analysis of the imminence of such conflict is compelling.

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<sup>15</sup> This Court's recent decision in *Webster v. Reproductive Health Services*, \_\_\_\_ U.S.\_\_\_\_, 109 S. Ct. 3040 (1989) is not inconsistent with the standard for preemption employed by the Second Circuit in this case. In the portion of *Webster* cited by the PSC (Petition, p. 18), the Court stated that it would not consider the constitutionality of the preamble to a statute which a state had *declined* to enforce. As the Court explained, "[i]t will be time enough . . . to address the meaning of the preamble should it be applied to restrict the activities of appellees in some concrete way [because federal courts are not empowered to resolve] abstract propositions." 109 S. Ct. at 3050. There is nothing abstract about the PSC's position; the conflict with FERC jurisdiction is real. The PSC has threatened National Fuel with a fine of \$100,000 a day if it begins construction pursuant to its FERC certificate without also securing certification under Article VII.

<sup>16</sup> In addition, as discussed above at pp. 16-18, site-specific environmental review by the PSC directly conflicts with FERC certification proceedings.

[O]nce PSC proceedings begin, [the PSC] can in its discretion attempt to exercise whatever portions of its regulatory authority it chooses, subject only to review by the New York courts with the possibility of discretionary review in the United States Supreme Court. Although its litigating posture in this case is to designate site-specific environmental review as its goal, Article VII offers no guidelines or directions preventing the PSC from attempting to exercise other aspects of its regulatory authority with regard to National Fuel's project. So-called piecemeal application of Article VII would thus allow the PSC to confront interstate transporters of gas with as much of the panoply of Article VII regulation as it chooses and to force them to litigate the preemption question issue by issue in state tribunals. Even if a transporter were ultimately successful before the PSC, the practical effect would be to undermine the FERC approval by imposing the costs and delays inherent in litigation that must be undertaken without any guidelines as to limits on the exercise of state authority.

Petition Appendix A, pp. 15a-16a; *National Fuel Gas Supply Corp. v. PSC*, 894 F.2d at 578.

The reality behind the Second Circuit's concerns is amply illustrated by the PSC's proceedings in Case No. 70350 on a Columbia Gas Transmission Corporation pipeline project.<sup>17</sup> In that proceeding, the PSC considered five alternatives to the FERC-approved route, in essence conducting *de novo* review of FERC's routing decisions under the guise of site-specific environmental review. While the PSC adopted a route not significantly different than the FERC-approved route, Columbia Gas was forced to relitigate the routing issues, with all of the delays and uncertainties inherent in that process. Permitting the PSC to apply Article VII to interstate natural gas pipeline facilities opens the door for state regulatory agencies to

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<sup>17</sup> The PSC's Order in Case No. 70350, Opinion 89-23 issued July 20, 1989, was submitted as part of the record below by the PSC.

pursue their own parochial agendas, or provide other local interests with a second forum, duplicating FERC, to litigate wholly local concerns implicated by interstate natural gas pipelines.

The record supports the Second Circuit's conclusion that there is an imminent possibility that Article VII proceedings would frustrate federal objectives and conflict with federal decisions. That is sufficient to support its conclusion that Article VII is completely preempted by the Natural Gas Act with respect to interstate natural gas pipeline facilities.

Section 121 subd. 4.c. of the New York Public Service Law cannot "save" Article VII from preemption, as the PSC contends. The Second Circuit properly rejected this argument because direct conflict exists between Article VII, even if limited to site-specific environmental review, and FERC's comprehensive regulatory scheme. *See supra* pp. 16-18. In addition, the purported savings clause does nothing more than restate the PSC's obligations under the Supremacy Clause; it does not guarantee that the PSC will abide by those obligations. As the Second Circuit reasoned:

If the PSC is correct, moreover, no state law, no matter how inconsistent with a federal law, would ever be facially preempted so long as it included a provision stating that the relevant state tribunals would abide by the Supremacy Clause, an obligation to which they are already bound.

Petition Appendix A, p. 16a; *National Fuel Gas Supply Corp. v. PSC*, 894 F.2d at 578.

## CONCLUSION

For the foregoing reasons, the Public Service Commission's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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